IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

HERBERT WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 03-785-SLR
	)	
FIRST CORRECTIONAL MEDICAL,	)	
DR. TATAGARI, and TOM CARROLL,	)	
	)	
	)	
Defendants.	)	

Herbert Williams, Delaware Correction Center, Smyrna, Delaware. Pro se Plaintiff.

Aaron R. Goldstein, Esquire, Deputy Attorney General, Delaware Department of Justice, Wilmington, Delaware. Counsel for Defendant Tom Carroll.

MEMORANDUM OPINION

Dated: October 13, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On or about August 7, 2003, Herbert Williams, a pro se plaintiff proceeding in forma pauperis ("plaintiff"), filed the present action against First Correctional Medical, Dr. Tatagari, and Tom Carroll ("Carroll").[1] Plaintiff is incarcerated at the Delaware Correctional Center ("DCC"). In his complaint, plaintiff alleges that, pursuant to 42 U.S.C. § 1983[2], the defendants deprived him of proper medical care in violation of the Eighth Amendment.[3] (D.I. 2) Plaintiff seeks compensatory damages for pain and suffering stemming from the alleged failure of the First Correctional Medical personnel and DCC Warden Thomas Carroll to adequately provide medical care for his condition. (D.I. 2) The court has jurisdiction over the instant suit pursuant to 28 U.S.C. § 1331. Presently before the court is

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[1] Plaintiff removed defendant Dana Baker from his original complaint. (D.I. 6)

[2] 42 U.S.C. § 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

[3] Although plaintiff does not specifically mention 42 U.S.C. § 1983 or the Eighth Amendment in his complaint, it appears throughout defendant Carroll's motion for judgment on the pleadings that plaintiff was in fact relying on his rights under the Eighth Amendment. (D.I. 17)

defendant Carroll's motion for judgment on the pleadings and plaintiff's motion for representation by counsel. (D.I. 17, 20) For the reasons that follow, the court grants defendant's motion for judgment on the pleadings and denies plaintiff's motion for representation by counsel.

II. BACKGROUND

Plaintiff is an inmate within the Delaware Department of Correction, housed at the DCC in Smyrna, Delaware. (D.I. 2) Plaintiff alleges that, at some point during his incarceration at DCC, he was placed under the care of First Correctional Medical for treatment. (D.I. 2) While he has been seen "on several occasions" by a doctor on the medical staff of First Correctional Medical, plaintiff further alleges that the non-State personnel have "failed to properly maintain [his] health status." (D.I. 2) Further, plaintiff claims that Carroll, as Warden and "overseer of [the DCC], has failed to protect [plaintiff's] rights and health status as an inmate at [DCC]." (D.I. 2)

Pursuant to DCC procedures, plaintiff claims that he did fill out and submit two grievance forms concerning his alleged hernia. (D.I. 2) Plaintiff states that as of the time he filed

this action, however, his grievances have not been heard.[4] (D.I. 2)

III. STANDARD OF REVIEW

When considering a motion for judgment on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c), the court must "accept the allegations in the complaint as true, and draw all reasonable factual inferences in favor of the Plaintiff." Turbe v. Gov't of the Virgin Islands, 938 F.2d 427, 428 (3d Cir. 1991). The motion can be granted only if no relief could be afforded under any set of facts that could be provided. Id.; see also Southmark Prime Plus, L.P. v. Falzone, 776 F. Supp 888, 891 (D. Del. 1991) (citation omitted); Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Ctr., 536 F. Supp. 1065, 1072 (E.D. Pa.

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[4] Defendant Carroll argues in his answer to plaintiff's complaint that plaintiff did not exhaust his administrative remedies prior to filing this action pursuant to the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). (D.I. 13) Before filing a civil action, a plaintiff-inmate must exhaust his administrative remedies, even if the ultimate relief sought is not available through the administrative process. See Booth v. Churner, 206 F.3d 289, 300 (3d Cir. 2000), cert. granted, 531 U.S. 956 (2000), aff'd, 121 S. Ct. 1819 (2001). See also Ahmed v. Sromovski, 103 F. Supp.2d 838, 843 (E.D. Pa. 2000) (quoting Nyhuis v. Reno, 204 F.3d 65, 73 (3d Cir. 2000) (stating that § 1997e(a) "specifically mandates that inmate-plaintiffs exhaust their available administrative remedies").

In the case at bar, although the entire medical grievance procedure was not completed, plaintiff sufficiently pursued his administrative remedies by filing two grievance forms. Defendants have presented insufficient evidence to show any response to the grievance forms, as mandated by the grievance procedure itself. Thus, the court finds that plaintiff exhausted his administrative remedies.

1982) ("If a complaint contains even the most basic of allegations that, when read with great liberality, could justify plaintiff's claim for relief, motions for judgment on the pleadings should be denied."). However, the court need not adopt conclusory allegations or statements of law. In re General Motors Class E Stock Buyout Sec. Litig., 694 F. Supp. 1119, 1125 (D. Del. 1988).

IV. DISCUSSION

A. Plaintiff's Section 1983 Claim Against Defendant Carroll

In order to recover against defendant Carroll, plaintiff must show that he was deprived of a constitutional right by a person acting under color of state law. See, e.g., Groman v. Township of Manalapan, 47 F.3d 628, 633 (3rd Cir. 1995)(citing Gomez v. Toledo, 446 U.S. 635, 640 (1980)). Because Carroll was the Warden at DCC at the time of the alleged incident(s), it is clear that defendant was acting under color of state law. See Cespedes v. Coughlin, 956 F. Supp. 454, 465 (S.D.N.Y. 1997). Accordingly, the court next addresses whether plaintiff has sufficiently alleged that defendant Carroll deprived him of his Eighth Amendment rights.

The State of Delaware has an obligation to provide "adequate medical care" to the individuals who are incarcerated in its prisons. See Inmates of Allegheny County jail v. Pierce, 612

F.2d 754, 762 (3rd Cir. 1979)(citations omitted). To state a violation of the Eighth Amendment right to adequate medical care, plaintiff "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976); accord White v. Napoleon, 897 F.2d 103, 109 (3d Cir. 1990). Plaintiff must demonstrate: (1) that he had a serious medical need; and (2) that the defendant was aware of this need and was deliberately indifferent to it. See West v. Keve, 571 F.2d 158, 161 (3d Cir. 1978); see also Boring v. Kozakiewicz, 833 F.2d 468, 473 (3d Cir. 1987). Either actual intent or recklessness will afford an adequate basis to show deliberate indifference. See Estelle, 429 U.S. at 105.

The seriousness of a medical need may be demonstrated by showing that the need is "'one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention.'" Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (quoting Pace v. Fauver, 479 F. Supp. 456, 458 (D.N.J. 1979)). Moreover, "where denial or delay causes an inmate to suffer a life-long handicap or permanent loss, the medical need is considered serious." Id.

As to the second requirement, an official's denial of an inmate's reasonable requests for medical treatment constitutes

deliberate indifference if such denial subjects the inmate to undue suffering or a threat of tangible residual injury. Id. at 346. Deliberate indifference may also be present if necessary medical treatment is delayed for non-medical reasons, or if an official bars access to a physician capable of evaluating a prisoner's need for medical treatment. Id. at 347. An official's conduct, however, does not constitute deliberate indifference unless it is accompanied by the requisite mental state. Specifically, "the official [must] know . . . of and disregard . . . an excessive risk to inmate health and safety; the official must be both aware of facts from which the inference can be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). While a plaintiff must allege that the official was subjectively aware of the requisite risk, he may demonstrate that the official had knowledge of the risk through circumstantial evidence and "a fact finder may conclude that a[n] . . . official knew of a substantial risk from the very fact that the risk was obvious." Id. at 842.

The law is clear that mere medical malpractice is insufficient to present a constitutional violation. See Estelle, 429 U.S. at 106; Durmer v. O'Carroll, 991 F.2d 64, 67 (3d Cir. 1993). Prison authorities are given extensive liberty in the treatment of prisoners. See Inmates of Allegheny County Jail v.

Pierce, 612 F.2d 754, 762 (3d Cir. 1979); see also White, 897 F.2d at 110 ("[C]ertainly no claim is stated when a doctor disagrees with the professional judgment of another doctor. There may, for example, be several acceptable ways to treat an illness."). The proper forum for a medical malpractice claim is in state court under the applicable tort law. See Estelle, 429 U.S. at 107.

Plaintiff admits in his complaint that he has been treated on several occasions by the medical staff at DCC. (D.I. 2) Plaintiff merely contends that the medical staff has failed to comply with his requests that he be "placed on a surgical call with an outside hospital." (D.I. 2) The record is void of any indication that plaintiff's condition is "'one that has been diagnosed by a physician as **requiring treatment** or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention.'" Lanzaro, 834 F.2d at 347(emphasis added). Moreover, "courts will not 'second-guess the propriety or adequacy of a particular course of treatment [which] remains a question of sound professional judgment.'" Boring, 833 F.2d at 473 (citing Pierce, 612 F.2d at 762). While the plaintiff may disagree with the medical treatment he is receiving, this does not support a § 1983 claim. "Where the plaintiff has received some care, inadequacy or impropriety of the care that was given will not support an Eighth Amendment claim." Norris v. Frame,

585 F.2d 1183, 1186 (3d Cir. 1978) (citing Roach v. Kligman, 412 F. Supp. 521 (E.D. Pa 1976). Therefore, because plaintiff failed to allege that his injuries were sufficiently serious, the allegation against defendant Carroll fails to satisfy the seriousness prong of the Estelle test.

Even if the court were to assume that plaintiff satisfied the seriousness prong of the Estelle test, defendant Carroll would be entitled to judgment on the pleadings because plaintiff's complaint fails to allege an act or omission by Carroll that demonstrates deliberate indifference to plaintiff's serious medical needs. See City of Canton v. Harris, 489 U.S. 378 (1989); Sample v. Diecks, 885 F.2d 1099 (3rd Cir. 1989). In his complaint, plaintiff does not contend that Carroll was personally involved in the medical care provided to him. Rather, plaintiff asserts that "Warden Tom Carroll, as an overseer of this institution, has failed to protect [plaintiff's] rights and health status as an inmate at DCC." (D.I. 2) Thus, plaintiff's claim against Carroll is premised on the doctrine of respondeat superior. It is well established, however, that absent some sort of personal involvement in the allegedly unconstitutional conduct, a defendant cannot be held liable under a respondeat superior theory. See Fagan v. City of Vineland, 22 F.3d 1283, 1291 (3rd Cir. 1994); Gay v. Petsock, 917 F.2d 768 (3rd Cir.

1990). Therefore, plaintiff's allegations against Carroll fail to satisfy the deliberate indifference prong of the Estelle test.

Plaintiff's complaint is based on a disagreement over the proper means of treatment and not a deliberate indifference to a sufficiently serious medical need. In sum, the allegations of the complaint, even when viewed in a light most favorable to plaintiff, fall short of supporting a § 1983 claim against defendant Carroll. Accordingly, defendant Carroll's motion for judgment on the pleadings is granted.

B. Plaintiff's Motion for Appointment of Counsel

With regard to his cause of action against the remaining defendants, plaintiff seeks appointment of counsel. (D.I. 20) Having reviewed plaintiff's complaint, the court finds that plaintiff's allegations are not of such a complex nature that representation by counsel is warranted at this time.

Plaintiff, a pro se litigant proceeding in forma pauperis, has no constitutional or statutory right to representation by counsel. See Parham v. Johnson, 126 F.3d 454, 456-57 (3d Cir. 1997); Tabron v. Grace, 6 F.3d 147, 153-54 (3d Cir. 1993). Ray v. Robinson, 640 F.2d 474, 477 (3d Cir. 1981). It is within the court's discretion, however, to seek representation by counsel for plaintiff, but this effort is made only "upon a showing of special circumstances indicating the likelihood of substantial

prejudice to [plaintiff] resulting . . . from [plaintiff's] probable inability without such assistance to present the facts and legal issues to the court in a complex but arguably meritorious case." Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984).

Initially, the court must examine the merits of a plaintiff's claim to determine whether it has some arguable merit in fact and law. See Parham, 126 F.3d at 457 (citing Tabron, 6 F.3d at 157); accord Maclin v. Freake, 650 F.2d 885, 887 (7th Cir. 1981)(per curiam)(cited with approval in Parham and Tabron). Only if the court is satisfied that the claim is factually and legally meritorious, should it then examine the following factors: (1) the plaintiff's ability to present his own case; (3) the complexity of the legal issues; (3) the extensiveness of the factual investigation necessary to effectively litigate the case and the plaintiff's ability to pursue such an investigation; (4) the degree to which the case may turn on credibility determinations; (5) whether the testimony of expert witnesses will be necessary; and (6) whether the plaintiff can attain and afford counsel on his own behalf. See Parham, 126 F.3d at 457-58 (citing Tabron, 6 F.3d at 155-56, 157 n.5). This list, of course, is illustrative and by no means exhaustive. See Parham, 126 F.3d at 458. Nevertheless, it provides a sufficient foundation for the court's decision.

While the court believes that plaintiff's Eighth Amendment claims are not frivolous within the meaning of 28 U.S.C. § 1915A(b)(1)[5], the court does not believe that plaintiff meets the remaining Parham and Tabron factors. First, although plaintiff has restricted use of the law library, as well as a limited ability to conduct a thorough investigation into the law of his case, he has presented his case in a clear and concise manner. It appears from the allegations and the record before the court that he does not need assistance gathering facts to support his claims. Additionally, the court finds that the issues, as currently presented, are not legally or factually complex. It is unclear at this point whether the case may turn on credibility determinations or on the testimony of expert witnesses. Therefore, the court declines to appoint counsel at this stage in the litigation.

V. CONCLUSION

For the reasons stated above, the court grants defendant's motion for judgment on the pleadings and denies plaintiff's motion for representation by counsel. An appropriate order shall issue.

[5] This court determined that the complaint was not frivolous within the meaning of 28 U.S.C. § 1915A(b). (D.I. 7)